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Attorney for Material Witnesses: ERNESTO MARTINEZ-MOSQUEDA
JOSE ALBERTO TOLEDO-CORRALES
BLANCA MORADO-LOPEZ

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF CALIFORNIA**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>JOSE BAUDILO GASTELUM,<br><br>Defendant. | Criminal Case No. 08cr2032-JLS<br><br>**NOTICE OF MOTION AND MOTION FOR THE TAKING OF A DEPOSITION OF THREE MATERIAL WITNESSES**<br><br>**DATE: July 31, 2008**<br><br>**TIME: 10:30 a.m.**<br>**COURT: Hon. Jan M. Adler**<br>**San Diego, California** |

**TO: ROBERT REXRODE, ESQ., Attorney for Defendant**

**TO: CHARLOTTE KAISER, AUSA, Attorney for the Prosecution.**

**PLEASE TAKE NOTICE** that on Thursday, July 31, at 10:30 am, or as soon thereafter as counsel may be heard, in the Courtroom of the Honorable Jan M. Adler in San Diego, California, the material witnesses, ERNESTO MARTINEZ-MOSQUEDA, JOSE ALBERTO TOLEDO-CORRALES , and BLANCA MORADO-LOPEZ, by and through their counsel, JAMES C. ALVORD, will bring the above entitled motion.

**MOTION**

The material witnesses, ERNESTO MARTINEZ-MOSQUEDA, JOSE ALBERTO TOLEDO-CORRALES, and BLANCA MORADO-LOPEZ, by and through their counsel, JAMES C. ALVORD, and pursuant to Rule 15(a) of the Federal Rules of Criminal Procedure, and pursuant to 18 U.S.C. Section 3144, move for an order to secure their testimony pending trial, and for an order for their release from custody immediately thereafter.

This motion will be made on the grounds that the witnesses are unable to meet any condition of release and that their testimony can be adequately be secured by deposition, and that further detention is not necessary to prevent a failure of justice and would, in fact, perpetuate an extreme hardship on the material witnesses and their families.

This motion will be made based upon the Declaration of James C. Alvord, Esq., the Points and Authorities in Support of the Motion, and all documents and records on file herein, and upon such oral testimony as the Court may deem proper.

DATED: July 15, 2008

S/ James C. Alvord
JAMES C. ALVORD
Attorney for the
Material Witnesses

JAMES C. ALVORD, Esq.
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Suite B
Fallbrook, CA 92028

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Attorney for Material Witnesses: ERNESTO MARTINEZ-MOSQUEDA
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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>JOSE BAUDILO GASTELUM,<br><br>Defendant. | Criminal Case No. 08cr2032-JLS<br><br>**DECLARATION OF ATTORNEY JAMES C. ALVORD IN SUPPORT OF A MOTION FOR THE TAKING OF VIDEO-TAPED DEPOSITIONS OF MATERIAL WITNESSES**<br><br>**DATE: July 31, 2008**<br><br>**TIME: 10:30 a.m.**<br>**COURT: Hon. Jan M. Adler**<br>**San Diego, California** |

**I, JAMES C. ALVORD,** attorney for material witnesses, ERNESTO MARTINEZ-MOSQUEDA, JOSE ALBERTO TOLEDO-CORRALES, and BLANCA MORADO-LOPEZ, declare that I am an attorney duly licensed to practice law in the State of California and in the United States District Court for the Southern District of California.

I further declare that on or about June 9, 2008, I was appointed by United States Magistrate Judge Peter C. Lewis to represent three material witnesses in the above-referenced alien smuggling case. Despite my best efforts to secure a release on bond for my clients they remain in custody.

The detained witnesses have informed me that they have no one, not a relative, friend or acquaintance, who would be willing and qualified to serve as a personal surety for any of them. Efforts of this office to locate a proper individual to act as personal surety for any of the witnesses have been unsuccessful as well. Therefore, the witnesses have remained in custody since their arrest by United States Border Patrol agents nearly two months ago.

This is a particularly cruel time in the lives of my clients to remain in jail as each of them has taken on the responsibility of providing for not only their children, but their parents back in Mexico as well. Each individual contributes to the support of his family, or they had been doing so prior to their arrest.

In addition, while relatively young, Ms. Morado-Lopez has two young children who have been without their mother for the entire period of her confinement. She appears to a naive individual, ill-equipped to withstand the fears and burdens associated with confinement.

The fact that all three witnesses are enduring considerable hardship cannot be refuted.

In view of these facts, I solicited and received permission from all three of my clients to seek an Order of this Court for taking of their video-taped deposition in order that they might soon be able to return home to their families in Mexico.

I fully explained the procedures involved in the requested deposition and received the promise of each of my clients of their complete cooperation in the video deposition process.

I am unaware of any reason why the witnesses should not be released after the video deposition pursuant to Rule 15 (a) of the Federal Rules of Criminal Procedure.

I believe it would be in the interests of justice to allow the testimony of the material witnesses in question to be secured by video deposition and to thereafter release the witnesses back to their families in Mexico in order to prevent further suffering from incarceration and its attendant hardships.

It is clear that continued incarceration of these witnesses will unnecessarily prolong their hardship.

I declare under penalty of perjury that the foregoing is true and correct.

**DATED: July 15, 2008**

**S/ James C. Alvord**
**JAMES C. ALVORD**
**ATTORNEY FOR**
**THE MATERIAL WITNESSES**

JAMES C. ALVORD, Esq.
405 South Main Street
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Attorney for Material Witnesses: ERNESTO MARTINEZ-MOSQUEDA
JOSE ALBERTO TOLEDO-CORRALES
BLANCA MORADO-LOPEZ

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| UNITED STATES OF AMERICA, | Criminal Case No. 08cr2032-JLS |
| Plaintiff, | **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR THE TAKING OF THREE WITNESS DEPOSITIONS** |
| v. | **DATE: July 31, 2008** |
| JOSE BAUDILO GASTELUM, | **TIME: 10:30 a.m.** |
| | **COURT: Hon. Jan M. Adler San Diego, California** |
| Defendant. | |

**I.**
**INTRODUCTION**

The material witnesses, **ERNESTO MARTINEZ-MOSQUEDA, JOSE ALBERTO TOLEDO-CORRALES, and BLANCA MORADO-LOPEZ** were arrested on or about June 5, 2008, near Calexico, California, by officers of United States Border Patrol after they had illegally entered the United States.

All three were later designated as material witnesses and placed in custody by US Marshals and subsequently transported to the

Imperial County Jail where they remain in custody. They may remain so indefinitely as a qualified surety cannot be found for any of the three individuals.

These witnesses, by and through their appointed counsel, James C. Alvord, move this Court for an Order under U.S.C. Section 3144 and Federal Rule of Criminal Procedure 15, as the witnesses have been unable to secure a surety under the conditions imposed by the government in this matter.

**II.**

**UNDER EXISTING FEDERAL LAW**
**THE COURT IS REQUIRED TO ORDER**
**THE DEPOSITION AND RELEASE OF THIS WITNESS**

The language of 18 U.S.C. Section 3144 provides that material witnesses who are unable to comply with any condition of release have the right to have their depositions taken and thereafter be released:

*"No material witness may be detained because of inability to comply with a condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice..."*

Further, Federal Rule of Criminal Procedure 15(a) provides the procedure basis for this motion for deposition:

*"If a witness is detained pursuant to Section 3144 of Title 18, United States Code, the Court on written motion of the witness and upon notice to the parties may direct that the witness's deposition be taken. After the deposition has been subscribed the Court may*

*discharge the witness..."*

The language of 18 U.S.C. 3144 is mandatory and requires material witnesses's deposition and release. Moreover, any ambiguity which exists in 18 U.S.C. Section 3144 must be construed in favor of material witnesses where they were incarcerated indefinitely without being charged with any criminal violation.

As part of In Re Class Action Application for Habeas Corpus on behalf of all Material Witnesses in the Western District of Texas, 612 Fed.Supp. 940, 945 (1985), the Court stated:

*As a final matter, this Court is of the opinion that 18 U.S.C. Section 3144 required that an individual incarcerated as a material witness be deposed if certain requirements are met. Without assistance of counsel, it is this Court's belief that deposition of the material witnesses rarely go forward and that as a consequence, the incarceration of material witnesses is prolonged. This Court is of the opinion that extant procedures not only create the risk of erroneous deprivations of liberty, but also create the risk of unnecessarily prolonged deprivations of liberty..."*

The instant witness is entitled to due process of the law under the Fifth Amendment. Id. 612 Fed. Supp. at 944. Also see United States v. Linton, 502 Fed. Supp. 878 (1980), which had a material witness's deposition ordered and then ordered the release of the material witness despite failure of the witness to appear in response to subpoena in the underlying criminal action.

Further, legislative history supports the position that the deposition and release of the material witness is mandatory.

Section 3144: RELEASE OR DETENTION OF A MATERIAL WITNESS, reads (in part):

*"This Section carries forward, with two significant changes, current 18 U.S.C. 3149 which concerns the release of a material witness. If a person's testimony is that it may become impracticable to secure his presence by subpoena, the government is authorized to take such person into custody. A judicial officer is to treat such a person in accordance with Section 3142 and to impose those conditions of release that he finds to be reasonably necessary to assure the presence of the witness as required, or if no conditions of release will assure the appearance of the witness, order his detention as provided in Section 3142. However, if a material witness cannot comply with release conditions or there are no release conditions that will assure his appearance, but he will give a deposition that will adequately preserve his testimony, the judicial officer is required to order the witness's release after the taking of the deposition if this will not result in a failure of justice...1984 U.S. Code Cong. and Adm. News, p 3182.*

In the instant mater, counsel for the detained material witness believes there will be no failure of justice in requiring the deposition, and asserts that such contention is supported by case law. It is true that defendant has a Constitutional right to confront and cross-examine witnesses against them, but this right must be balanced against the Constitutional rights of the detained witness. In this matter, the defendant is represented by counsel, said counsel has not been denied the opportunity to interview the witness while the witness has been detained, and said counsel and his client will be notified of the time and place of the deposition and are invited to ask all questions of the witnesses which they believe will further their case.

## III.
## THE WITNESSES AND THEIR FAMILIES ARE SUFFERING ECONOMIC HARDSHIP AS A RESULT OF THEIR CONTINUING INCARCERATION

Federal courts in this District have been applying Torres-Ruiz v. U.S. District Court For The Southern District of California, 120 F.3d 933 (9th Cir. 1997) as support for a decision to order the depositions and subsequent release of material witnesses. Some of these same courts have also been asking for some reassurance that continued incarceration of witnesses will result in a hardship for the witnesses. Counsel for this witness has provided the Court with a separate declaration identifying the circumstances which are in place creating severe economic and personal hardships for this witness and his family. Thus, this standard and often-applied requirement has been met.

## IV.
## CONCLUSION

Under the clear meaning of U.S.C. Section 3144, legislative history and relevant case law, the ordering of deposition and subsequent release of these material witnesses appears mandatory.

With that in mind, the witnesses respectfully request this Court grant a video deposition of their testimony and then order their release.

**DATED: July 15, 2008**

**S/ James C. Alvord**
**JAMES C. ALVORD**
**Attorney for the Material Witnesses**

Criminal Case Number: 08cr2032-JLS

Proof of Service

I, the undersigned whose address appears below, certify:

That I am not a party to the above-referenced action; that I am a member of the bar of this court;
That my office is located at:

Law Office of James C. Alvord
405 S. Main Street, Suite B
Fallbrook, CA 92028

That I am, and at all times hereinafter mentioned was, more than 18 years of age;
That on July 15, 2008, I electronically served a true copy of:

*Notice of Motion and Motion For The Taking of a Deposition of Three Material Witnesses*
*Declaration of Attorney Alvord in Support of Motion For The Taking of Video Depositions of Three Material Witnesses*
*Memorandum of Points and Authorities in Support of Motion For The Taking of Video Depositions of Three Material Witnesses*
*Deposition Order (Proposed) For The Taking of Video Depositions of Three Material Witnesses*

On all parties to this matter by:

Electronically filing the above-referenced document through the official CM/ECF web site on this day.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATE: July 15, 2008

S/ James C. Alvord
JAMES C. ALVORD